

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District <b>Western District of New York (Rochester)</b>
Name <i>(under which you were convicted)</i> : <b>DEARICK SMITH</b>		Docket or Case No.: <b>6:09-cr-06064-CJS</b>
Place of Confinement: <b>HAZLETON, 1640 SKY VIEW DR, BRUCETON MILLS, WV 26525</b>		Prisoner No.: <b>16837055</b>
UNITED STATES OF AMERICA		Movant <i>(include name under which convicted)</i> <b>V. DEARICK SMITH</b>

**MOTION**

1. (a) Name and location of court which entered the judgment of conviction you are challenging:  
U.S. District Court for the Western District of New York (Rochester), 100 State Street, Rochester, NY 14614

(b) Criminal docket or case number (if you know): 6:09-cr-06064-CJS

2. (a) Date of the judgment of conviction (if you know): 6/26/2013

(b) Date of sentencing: 6/26/2013

3. Length of sentence: Total term of 600 months imprisonment

4. Nature of crime (all counts):

Conspiracy to Possess with Intent to Distribute, and to Distribute, Fifty (50) Grams or More of Cocaine Base and Five (5) Kilograms of Cocaine (count I); Possession of Firearms in Furtherance of a Narcotics Conspiracy (count II); Conspiracy to Engage in a Pattern of Racketeering Activity (count III); Possession of a Firearm in Furtherance of a Crime of Violence (count IV)

5. (a) What was your plea? (Check one)

(1) Not guilty ☒

(2) Guilty ☐

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☒

Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

Yes ☐

No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒

No ☐

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals, Second Circuit

(b) Docket or case number (if you know): 13-2486

(c) Result: convictions and sentence affirmed

(d) Date of result (if you know): 3/3/2017

(e) Citation to the case (if you know): none

(f) Grounds raised:

(I) The federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–42, divested the District court of jurisdiction over defendant's prosecutions for the charged RICO and narcotics conspiracies; (II) The District court erred in failing to determine JDA jurisdiction over the § 924(c) charges; (III) It was plain error to fail to instruct the jury that, in order to convict, it had to find beyond a reasonable doubt that defendant ratified his membership in the charged conspiracies after he turned eighteen; (IV) Defendant's conviction of possession of firearms in furtherance of a crime of violence under 18 USC sec. 924(c) cannot stand, because racketeering conspiracy does not have use, attempted use, or threatened use of physical force as an element, and because the residual clause is void for vagueness

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☒

No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): 17-5724

(2) Result: denied

(3) Date of result (if you know): 1/8/2018

(4) Citation to the case (if you know): none

(5) Grounds raised:

review of court of appeals and district court rulings regarding whether jury must be instructed and find that that the Government has proven that the defendant "ratified" his participation in the alleged criminal conspiracy after reaching his 18th birthday.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐

No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket of case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: \_\_\_\_\_

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**GROUND ONE: Ineffective Assistance of Trial and Appeal Counsel**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See supporting Certification of Defendant, accompanying this Petition. In summary, trial counsel misadvised defendant regarding the ratification aspect of the charges against him and failed to sufficiently contest the proofs and ensure complete jury instructions in this regard. Trial counsel failed to sufficiently investigate and obtain witnesses on defendant's behalf. Trial counsel misadvised defendant regarding his right to testify on his own behalf and the risks and rewards of same. Trial counsel failed to ensure correct and complete jury instructions were given at defendant's trial. Trial counsel misadvised defendant about the content and consequence of a stipulation made at trial and submitted to the jury. Trial and appellate counsel failed to sufficiently contest the alleged drug conspiracy and related crimes charged against defendant. Trial counsel failed to ensure that defendant received proper credit for time served against sentence imposed by the District court.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Ineffective assistance claim properly raised on 2255 when facts outside of trial record

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

**GROUND TWO:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

### GROUND THREE: \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

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**(b) Direct Appeal of Ground Three:**

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why:

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**(c) Post-Conviction Proceedings:**

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

- (2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

- (4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

- (5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

- (6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

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**GROUND FOUR:**

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(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

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**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

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Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The ineffective assistance of counsel claim has not been presented before because the claim is based on evidence outside the record and is typically raised on a petition for post-conviction relief. It is thus being raised here in this 2255 petition.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

J. Glenn Davis, Esq., 70 Niagara Street, Suite 500, Buffalo, NY 14202; 716-842-0483 (tel)

(b) At the arraignment and plea:

J. Glenn Davis, Esq., 70 Niagara Street, Suite 500, Buffalo, NY 14202; 716-842-0483 (tel)

(c) At the trial:

J. Glenn Davis, Esq., 70 Niagara Street, Suite 500, Buffalo, NY 14202; 716-842-0483 (tel)

(d) At sentencing:

J. Glenn Davis, Esq., 70 Niagara Street, Suite 500, Buffalo, NY 14202; 716-842-0483 (tel)

(e) On appeal:

Daniel M. Perez, Esq., 93 Spring Street -- Suite 505, Newton, New Jersey 07860

(f) In any post-conviction proceeding:

Michael Confusione, Flegge & Confusione, LLC, PO Box 366, Mullica Hill, NJ 08062; 800-790-1550 (present app)

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*

n/a (judgment of conviction became final when United States Supreme Court denied defendant's petition for writ of certiorari on 1/8/18)

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

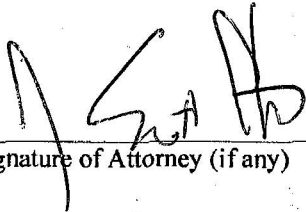
A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

vacate movant's convictions and sentence on ground of constitutionally ineffective assistance of trial counsel

or any other relief to which movant may be entitled.

  
\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on DECEMBER 3<sup>rd</sup>, 2018  
(month, date, year)

Executed (signed) on December 3<sup>rd</sup> 2018 (date)

  
\_\_\_\_\_  
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.